Supreme Court, U.S.
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No. 99-746

In The

Supreme Court of the United States

PETER LEHMAN,

Petitioner,

vs.

STATE OF MAINE,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

REPLY BRIEF OF PETITIONER

JAMES T. KILBRETH
Counsel of Record
HOPE K. CREAL
VERRILL & DANA, LLP
One Portland Square
P.O. Box 586
Portland, ME 04112-0586
(207)774-4000

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF PETITIONER

Respondent's brief in opposition to the petition for a writ of certiorari argues that there is no conflict among the federal courts, that the decision of the court below fully comports with this Court's Fourth Amendment cases, and that harmless error and "good faith" would render any decision of this Court merely advisory. None of these arguments withstands scrutiny.

At the outset, several of respondent's factual assertions merit a brief rebuttal:

1. Respondent's assertion that the warrant limited the search to the part of the computer system that petitioner was able to access is without merit. The exact language of the warrant that described the places or persons to be searched included:

> University of Maine system network. This is the computer network system for the entire University of Maine. Including, but not limited to, the University of Southern Maine's computer center located at 96 Falmouth Street, Portland, Maine, which Peter Lehman would have been able to access and would have been able to store information [sic].

Petition for a Writ of Certiorari *("Pet. Wr.")* and Appendix *("Pet. App.") 61*. The plain language of the warrant refutes respondent's argument.

2. Respondent's contention that petitioner failed to assert that he had a reasonable expectation of privacy in the University's computer system is simply wrong. *See Pet. Wr. 13-14*. Whether the record establishes that the University consented to a search of its computers for the evidence sought by police, as asserted by respondent, moreover, is irrelevant to this proceeding. The linchpin in determining whether a warrant passes constitutional

muster is the breadth of the search that is afforded to the police through the explicit language articulated in the warrant. *United States v. Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998) ("if a warrant fails for lack of particularity or specificity, it is simply unconstitutional – without regard to what actually occurred."). The primary test is not how the police conducted the search, or what the search revealed, but, rather, what did the warrant authorize? The University's consent, furthermore, hardly authorized the wholesale privacy invasion that occurred here.

3. Contrary to respondent's contention that all the videotapes and magazines were rightfully seized as contraband, *Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br.") 2-3*, numerous items seized were irrelevant to any prosecution. For example, one of the videotapes seized by police was a videotape containing highly sensitive private family information about petitioner's granddaughter. That videotape was wholly unrelated to the charges brought against petitioner and should never have been seized. Further, the partial inventory of computer hardware and software, which respondent has conceded is accurate, lists approximately 542 computer related items that were in fact taken. *Pet. App. 19-55.*[1] Even assuming, *arguendo*, that some items in addition to the detached hard drive found in petitioner's basement would have been used by the prosecution had the matter gone to trial, respondent cannot establish that any of petitioner's personal financial files or his academic files or any of the commercial compact disks (*Pet. App. 21 et seq.*), manuals (*Pet. App. 23 et seq.*), other papers logged

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[1] Petitioner's identification of 408 items in his initial brief thus substantially understates the number of these items.

with "manuals", (*Pet. App. 28 et seq.*) or the 408 disks (*Pet. App. 28 et seq.*) would have been relevant in any way to respondent's case against petitioner.

4. Respondent's reliance on the second warrant issued by the district court on October 10, 1997, the "Superceding/Supplemental Search Warrant" and Affidavit in Support thereof, is misplaced. The fact that the second warrant authorized a continuation of the original search and seizure – and identified numerous items seized as a result of that original search – does not cure the defects of the original warrant.

I. THE MAINE LAW COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THE LOWER FEDERAL COURTS

Respondent's attempt to distinguish the instant case from the conflicting federal court cases fails:

Contrary to respondent's assertion, the court in *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), did hold that an intermediate step of sorting relevant from irrelevant files was required in order for the search to be constitutional. Specifically, the court held that searching and seizing computer files when the police knew or had reason to know that those computer files were different from the computer files for which there was probable cause (as reflected in the warrant) was a violation of the Fourth Amendment. Although in the instant case the warrant did allow the search and seizure of all computer files and computer-related items, both cases involve a police search of computer files that exceeds the probable cause that supported the original warrant.

In *In re Grand Jury Investigation Concerning Solid State Devices, Inc. v. United States*, 130 F.3d 853 (9th Cir. 1997),

the court was determining whether the warrant at issue exceeded in scope the probable cause on which it was based. Thus, the issue in that case was exactly the same as the one presented by petitioner – whether the existence of probable cause for a search of some items could be bootstrapped into a search of *all* computer files.[2]

Finally, in *In re Grand Jury Subpoena Duces Tecum Dated November 15, 1993*, 846 F. Supp. 11 (S.D.N.Y. 1994), the issue again was whether the scope of a subpoena was reasonable given the strictures of the Fourth Amendment. Although the court stated that it was not reaching the defendant's Fourth Amendment argument, the analysis conducted by the court included whether the subpoena at issue unnecessarily demanded documents that were irrelevant to the grand jury inquiry, and whether, therefore, the subpoena was unreasonably broad under the Federal Rules of Criminal Procedure. While the *source* of the standard came from the Federal Rules of Criminal Procedure, the *standard* was the same as that invoked in the Fourth Amendment analysis – i.e., whether the government's power to obtain documents, whether through subpoena or warrant, was "unreasonably broad." *See, e.g., Carroll v. United States*, 267 U.S. 132, 149 (1925); *Boyd v. United States*, 116 U.S. 616, 623 (1886) (both stating that the principal question in determining the constitutionality of a search and seizure is whether a compulsory production of private papers is unreasonable).

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[2] Contrary to respondent's repeated assertions, petitioner has never conceded there was probable cause to search all his computer files and systems for digital images of *any* minors or any other materials. *See Pet. Wr. 7.*

II. THE MAINE COURT'S DECISION IS NOT CONSISTENT WITH THIS COURT'S PRECEDENTS

Respondent is correct in stating that petitioner does not assert that the Maine Law Court misstated this Court's general law of Fourth Amendment particularity. However, the Law Court's analysis was incomplete and failed to take into account critical parts of this Court's Fourth Amendment jurisprudence.

Contrary to respondent's assertion, *Resp. Br. 14-15*, petitioner is not arguing simply that the Court should hear this case because the lower court's decision is inconsistent with the "intermingled documents" approach adopted by the Ninth Circuit in *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982) – although it is true that the Law Court's decision is inconsistent with *Tamura*. Rather, the Law Court failed to adhere to this Court's prohibition against general warrants and searches that grossly exceed the probable cause upon which they are based, *see, e.g., Maryland v. Garrison*, 480 U.S. 79, 84 (1987), and to the mandate of *Stanford v. Texas*, 379 U.S. 476 (1965), which requires "scrupulous exactitude" in the description of the items to be seized when the First Amendment is at issue.

This Court has consistently interpreted the particularity requirement of the Fourth Amendment as requiring probable cause to support the specific areas and things to be searched, in order to prevent the types of "general warrants" that the Framers intended to prohibit. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) ("The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement insures that the

search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit"). In petitioner's case, and even more frequently with other citizens as their personal papers and effects become more computerized, the Fourth Amendment privacy concerns posed by computers and computer systems requires exceptional attention to the particularity requirement; a failure to do so will result in the evisceration of the Fourth Amendment.

The First Amendment implications of searching and seizing petitioner's personal computers, as well as the entire computer system of the University of Maine, were also completely ignored by the Law Court. This Court has long held that the search and seizure of a man's private papers is totally different from the search and seizure of stolen goods or other physical objects. *Boyd*, 116 U.S. at 623; *Carroll*, 267 U.S. at 147-149; *Stanford*, 379 U.S. at 484-485. Where, as here, entire computer systems that contain hundreds if not thousands of documents, personal papers and academic teaching materials, all of which lie at the heart of the First Amendment, are being searched, the Law Court's holding that the warrant at issue passed constitutional muster cannot stand.

III. THE "CONTAINER" ANALOGY OVERSIMPLIFIES THE COMPLEXITIES OF WHOLESALE COMPUTER SEARCHES AND IGNORES THE CONSEQUENCES OF SUCH SEARCHES TO FIRST AMENDMENT RIGHTS

To avoid the Fourth and First Amendment complexities raised by the computer search here, respondent fall

back on the "container" exception. This Court should reject the "container" analogy advocated by respondent and instead embrace the "intermingled documents" approach sanctioned by several lower courts and academics.

Respondent cites *Wyoming v. Houghton*, 119 S.Ct. 1297 (1999), and *United States v. Ross*, 456 U.S. 798, 824 (1982), for the proposition that containers may be searched where there is probable cause to believe that the object of the search will be found therein. In both *Wyoming v. Houghton*, and *Ross*, this Court approved warrantless searches of containers that were located in cars or on passengers riding in cars and that contained illegal drugs.

The comparison of petitioner's case to the search of simple containers in or on automobiles or their passengers, which are situations in which this Court has consistently held citizens have a reduced expectation of privacy, simply fails to acknowledge or address the complexities of broad computer searches, including the First Amendment consequences of those broad searches. This approach likens computer hardware, software and systems to a simple box that does nothing more than hold and protect its contents. Because computers and computer systems are far more complicated to search than simple boxes, the standards that have been developed for searching and seizing information that is part of a larger group of items which are presumptively protected by the First Amendment should be required.

In this case, furthermore, the vast majority of the items seized were not evidence of a crime but were irrelevant to the investigation. Respondent's reiteration of certain videotapes and magazines that were purportedly relevant to the investigation does not remedy that

problem. Respondent still cannot dispute that over 500 computer-related items were seized which were irrelevant to the prosecution of the alleged crimes. That number, in fact, is conservative because the inventory done was only a partial inventory, and, for example, does not include all of petitioner's academic materials, letters, personal papers and other computer files that were seized by police.

In order to prevent the kind of overzealous and unnecessary seizure of personal papers, documents and professional materials that may be kept on a computer, this Court should adopt the approach articulated in *Tamura*, 694 F.2d at 595, 596, which would require an objective magistrate to issue a second warrant further limiting the search of computers or computer systems. While respondent points to the Supplement/Superceding Warrant of October 10, 1997 as proof that this requirement was satisfied, a closer look at the second warrant reveals that it did nothing to *limit* which computer files could be viewed. Instead, it merely authorized the continuation of the search and seizure of all computers and computer-related equipment, including the irrelevant information already seized by the police.

IV. A REVERSAL OF THE MAINE COURT'S DECISION WILL NOT BE MERELY AN ADVISORY OPINION

Contrary to respondent's argument, grant of the petition and reversal of the decision below will not be a meaningless advisory opinion. The good-faith exception to the exclusionary rule as articulated in *United States v. Leon*, 468 U.S. 897 (1984), has no application to the broad Fourth Amendment policies at stake here – if searches of

entire computer systems are not lawful, judicial officers and law enforcement officers need a clearly articulated rule to ensure that such searches do not take place. Such a decision is hardly meaningless. Moreover, whether the exclusionary rule should then be applied is a separate question which, in light of the First Amendment interests implicated here, should be answered affirmatively. *Leon* did not involve any First Amendment considerations and in fact recognized explicitly that warrants "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid," *Leon*, 468 U.S. at 923, could not be used to justify a good faith exception.

Respondent's claim about petitioner's conditional guilty plea is equally unavailing. If respondent's argument were correct, then the conditional plea would be meaningless, since it would never result in any different outcome than an ordinary plea of guilty. Moreover, unlike *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987), *overruled on other grounds by United States v. Starkes*, 32 F.3d 100 (4th Cir. 1994), relied upon by respondent, where the court determined that the evidence in question had been lawfully seized, the evidence here was unlawfully seized.

Finally, the type of search conducted by police amounted to a general search, which requires suppression of all fruits. *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). Harmless error cannot be invoked in this circumstance. If any of the evidence has to be suppressed, moreover, petitioner is entitled to know what evidence will be suppressed and what evidence will ultimately be admissible before determining whether to enter a guilty

plea or go to trial. Further proceedings in the trial court, accordingly, at a minimum would be required on this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated at Portland, Maine this 6th day of January, 2000.

JAMES T. KILBRETH
Counsel of Record
HOPE K. CREAL

VERRILL & DANA
One Portland Square
P.O. Box 586
One Portland Square
Portland, ME 04112
(207)774-4000